

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 08-E-0053

**In the Matter of the Liquidation of  
Noble Trust Company**

**LIQUIDATOR'S MEMORANDUM IN  
SUPPORT OF SETTLEMENT MOTIONS**

Glenn A. Perlow, Bank Commissioner for the State of New Hampshire, in his capacity as Liquidator of Noble Trust Company (the "Liquidator" and "Noble Trust," respectively), by his attorneys, the Office of the Attorney General, Sheehan Phinney Bass + Green, Professional Association and Drummond Woodsum, submits this memorandum in support of the contemporaneous motions (the "Settlement Motions") to approve certain separate settlement and release agreements by and between the Liquidator and American National Insurance Company ("American National"); AXA Equitable Life Insurance Company ("AXA"); Credit Suisse Securities (USA) LLC, Credit Suisse Premium Finance LLC, Credit Suisse Management LLC, CSFB Private Insurance Brokerage, Credit Suisse Lending Trust (USA) 2, and Credit Suisse Lending Trust (USA) 3 (collectively, "Credit Suisse"); PHL Variable Insurance Company ("Phoenix"); The Lincoln National Life Insurance Company ("Lincoln National"); and Wells Fargo Bank, N.A. ("Wells Fargo").<sup>1</sup>

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<sup>1</sup> Parties who have filed joint motions for approval of settlement and release agreements with the Liquidator have not, by doing so, adopted all of the statements contained in this Memorandum. The Liquidator acknowledges that his view of the case has, in certain key respects, been disputed by various parties to the separate settlement and release agreements.

### **Preliminary Statement**

Since early in this proceeding, the Liquidator has engaged in negotiations with numerous parties involved in over one hundred high face value life insurance policies issued to or for the benefit of Noble Trust's clients by several insurers. The negotiations have proven successful, resulting in settlement agreements with insurers American National, AXA, Lincoln National, and Phoenix (the "Insurers"), as well as Credit Suisse, which provided premium financing with respect to certain of the policies, and Wells Fargo, a trustee of trusts that owned and were the beneficiaries of financed policies.<sup>2</sup> If the Settlement Motions are granted, the settlement agreements will result in net payments to the Liquidator of approximately \$6.5 million.

On April 17, 2012, the Liquidator filed a motion to approve a settlement and release agreement with Phoenix, and contemporaneously herewith has filed motions to approve settlement and release agreements with American National, AXA and Lincoln National. Each of the Insurers issued Credit Suisse-financed life insurance policies to certain trusts established for the benefit of Noble Trust clients. All but American National also issued policies not financed by Credit Suisse. Credit Suisse asserts a documented security interest in the policies that it financed. To resolve Credit Suisse's asserted interests in the policies affected by the American National, AXA, Lincoln National and Phoenix settlements, the Liquidator has negotiated and reached separate, but related settlement agreements with Credit Suisse and Wells Fargo. The Liquidator and Credit Suisse have contemporaneously herewith submitted joint motions, assented-to by Wells Fargo, to approve these settlement agreements.

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<sup>2</sup> As part of the premium financing arrangements, Wells Fargo executed documents which purport to have provided that the trusts assigned, transferred, pledged, and granted all of the trusts' claims, options, privileges, rights, title and interest in, to and under such policies as collateral to Credit Suisse.

Taken together, the settlement agreements resolve claims made by and against the Insurers, Credit Suisse/Wells Fargo and the Liquidator, providing substantial contributions to the Liquidator's fund for claimants of the estate while settling disputes between and among the parties that would be the subject of substantial, complex and costly litigation before this Court. For these reasons, and the reasons set forth below, the settlement agreements constitute a fair and reasonable resolution of these matters and should be approved by this Court.

### **Background**

1. In 2003, Noble Trust was organized and chartered under the laws of the State of New Hampshire as a non-depository banking corporation, and subject to regulation by the New Hampshire Banking Department (the "Banking Department").
2. As a result of irregularities discovered by the Banking Department's 2008 examination of Noble Trust, on February 11, 2008, Commissioner Peter Hildreth commenced a liquidation proceeding by filing a Verified Petition for Liquidation (the "Liquidation Petition") in this Court, seeking the appointment of a liquidator for Noble Trust pursuant to RSA 395:1, as well as related injunctive relief against Noble Trust pending the Court's ruling on the Liquidation Petition (the "Liquidation Proceeding").
3. On March 27, 2008, this Court entered an order (the "Liquidation Order") appointing Commissioner Hildreth as liquidator of both Noble Trust and its parent company, Aegean Scotia. The Liquidator is the duly appointed successor liquidator of Noble Trust and Aegean Scotia by order of this Court dated February 1, 2013.
4. Colin P. Lindsey ("Lindsey") was the president of Noble Trust and chairman of its board of directors. During the course of its business, Noble Trust solicited and received funds from both new and existing clients. Noble Trust's clients' funds were deposited into individual

management accounts or individual retirement accounts established for the benefit of those clients, or in charitable trusts for which Noble Trust clients were both the grantors and beneficiaries during their lives.

5. Lindsey also served as president or managing member of Balcarres Group, LLC ("Balcarres"),<sup>3</sup> a Nevada limited liability company. Both Lindsey and Balcarres were licensed by the New Hampshire Insurance Department and acted as insurance brokers in procuring insurance policies for the benefit of Noble Trust's clients.

6. Between June 2004 and September 2007, Noble Trust (acting as a trustee under its clients' trusts) invested approximately \$15 million in an entity known as Sierra Factoring, LLC ("Sierra"). Based upon information available to the Liquidator, the \$15 million investment in Sierra became substantially or entirely worthless, a fact that Lindsey did not disclose to Noble Trust's clients.

7. Instead, Lindsey attempted to conceal the loss from Noble Trust's clients and other parties in interest (including the Banking Department) through a fraudulent and illegal Ponzi scheme that relied, in part, upon the procurement of a number of life insurance policies for elderly insureds with face values generally between \$3 million and \$10 million.

8. As one means of maintaining this Ponzi scheme, Lindsey caused Noble Trust, acting as trustee or trust protector under various trusts or sub-trusts established for Noble Trust's clients, to submit applications (usually through Balcarres) for high face value insurance policies to a number of different insurance carriers, including the Insurers. Prior to the commencement of the Liquidation Proceeding, the Insurers issued life insurance policies (the "Policies") on the lives of certain individuals, each of whom are reflected in Noble Trust's books and records as

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<sup>3</sup> Pursuant to this Court's Order dated November 13, 2009, the assets of Balcarres were declared to be property of the Liquidation Proceeding.

Noble Trust clients (collectively the "Insureds").<sup>4</sup> The annual premiums for such Policies were very high. When these Policies were ultimately placed in force, in most cases, Lindsey or Balcarres were paid substantial commissions by the respective insurance carriers that were generally equal to or in excess of the first year annual premiums. Some of the proceeds of these commissions were used to attempt to cover up the Sierra losses by making payments to Noble Trust clients whose funds were invested in Sierra, to generate the appearance that the Sierra investments were still performing according to their terms. Other proceeds from the commissions were in turn used to fund payments of the premiums on insurance policies issued for the benefit of Noble Trust clients to make it possible to earn these commissions, since virtually all premiums for such policies were funded by non-recourse loans from Noble Trust or other third parties. Upon information and belief, Lindsey also intended to sell some of these Policies (or the beneficial interests therein) to third parties, and use the sale proceeds to cover up the Sierra losses. Thus, in virtually all cases, Lindsey pursued the issuance of insurance Policies for the purpose of hiding the Sierra losses and perpetuating the Ponzi scheme in which Noble Trust became engaged to hide its losses.

9. While the pursuit and generation of these commissions in and of itself constituted an essential component of Lindsey's ability to maintain his fraudulent Ponzi scheme to hide Noble Trust client losses, aspects of fraud and material misrepresentation on a policy by policy basis also pervaded the application process with respect to certain of the individual policies. A number of the applications misrepresented the applicants' net worth and/or income, and misrepresented that the high face value life insurance Policies were being sought as a means of individual estate planning. During the time period in question, there was a very active and

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<sup>4</sup> As set forth more fully in the Settlement Motions, American National issued two of the Policies, AXA issued 12 of the Policies, Lincoln National issued ten of the Policies and Phoenix issued 45 of the Policies.

lucrative secondary market for the sale of such policies. In reality, many of the individual insureds were induced to participate in the scheme in part through promises of profits from the sale of their Policies. These insureds had little or no expectation that either they or any other person with an insurable interest in their lives would receive the death benefit from the Policies. Since, in most instances, the Policies were placed in insurance trusts or sub-trusts that obtained non-recourse financing to pay the substantial premiums, the insureds had nothing to lose through these transactions. In light of these facts, the Policies appear to be voidable. See *Mechanicks National Bank v. Comins*, 72 N.H. 12, 15, 19 (1903) ("It is indeed firmly established that insurance procured by one person upon the life of another, the former having no insurable interest in the latter, is void as a wager contract, against public policy, which condemns gambling speculations upon human life. . . . [In addition] a life policy of insurance, valid in its inception, may be assigned to one having no insurable interest in the life insured, if the assignment is bona fide and not a device to evade the law against wager policies.")(Emphasis added); *Mooney v. Nationwide Mut. Ins. Co.*, 149 N.H. 355, 359, (2003) (upholding rescission of insurance policy where insured made material misrepresentations to the insurer under the principle that insured cannot benefit as against the insurer from his fraudulent misrepresentations). The incontestability period on all of the policies has not run because of the Court's injunction orders in the Liquidation Proceeding.

10. With the exception of the financing provided by Credit Suisse, in most instances, the premium financing was not disclosed to the insurance companies even though such disclosure was generally required by the insurance companies. With the exception of the financing provided by Credit Suisse, if the fact of premium financing was disclosed, the true source was often either misidentified or the terms of the financing were not accurately stated.

The interest rate and term of the financing was one means by which insurers were able to discern whether a policy was being sought for estate planning or instead for resale once the two year contestability period expired.

11. Credit Suisse provided premium financing for 13 of these Policies – seven AXA policies, three Phoenix policies, two American National policies and one Lincoln National policy (the "Financed Policies"). Unlike many of the other policies, the terms of the Credit Suisse financing of all of the Financed Policies were accurately stated and disclosed to the insurers. As part of the premium financing arrangements, Wells Fargo, as trustee of trusts that are the record owners and beneficiaries of the Financed Policies, executed documents which purport to have provided that the trusts assigned, transferred, pledged, and granted as collateral to Credit Suisse all of the trusts' claims, options, privileges, rights, title and interest in, to and under the Financed Policies. The collateral assignments were counter-signed and accepted by the Insurers.

12. The Liquidator has contended that all of the Policies, whatever the source of financing, are part of the liquidation estate being administered by the Liquidator pursuant to the Liquidation Order because, among other things, Noble Trust is trustee and, in some cases, trust protector of the trusts that procured, own and/or are designated as beneficiaries of trusts that own the Policies. With respect to the Financed Policies, as discussed above, Wells Fargo is the trustee and Noble Trust is the trust protector of the relevant trusts. The Liquidator also asserts an interest in the Policies because the procurement and issuance of the Policies themselves was a critical part of the fuel that permitted Lindsay to perpetuate the Noble Trust Ponzi scheme, resulting in substantial commissions obtained by Lindsay or Balcarres that would, in turn, be distributed to prior investors as fictitious profits, be used for the fraudulent procurement of other Policies or be used for some other unlawful purpose. In connection therewith, the Liquidator has

asserted numerous claims against the Insurers with respect to the issuance of the Policies, and with respect to the disposition of the premiums paid to the Insurers. The Liquidator has also asserted that because of the defects in their issuance and because of their centrality in the illegal Ponzi scheme, the Policies are all potentially void or voidable and that the Liquidator has the power to seek relief to effectuate that result. The Insurers have asserted that the Policies are not properly included within the liquidation estate, and that the Liquidator has no valid interest in the Policies. Credit Suisse and Wells Fargo have made a similar assertion as to the Financed Policies. Resolving these disputes avoids what would have required substantial, complex and costly litigation among the Liquidator, the Insurers, Credit Suisse and Wells Fargo.

13. In the course of their negotiations concerning their various claims, rights and interests in and disputes related to the Policies, the Liquidator demanded that the Insurers return the premiums that they received under the Policies. Each Insurer countered that it was not required to return any of the premiums to the Liquidator due to the equitable offset of its claims arising from the substantial commissions it paid to Balcarres, Lindsey and others in connection with the Policies. The Insurers also have asserted that courts have permitted insurers to void policies procured through fraud or that lack a valid insurable interest without requiring the insurer to refund premiums. The Insurers also asserted various charges, expenses and other costs provided for under the Policies that would reduce the amount of premiums that they would be required to return in any event, even without respect to their claim of setoff. The Liquidator disputed the merits of the Insurers' legal theories.

14. Because Credit Suisse and Wells Fargo assert a documented interest in the Financed Policies, a comprehensive settlement between the Liquidator and the Insurers is not possible without also resolving the interests of Credit Suisse and Wells Fargo in the Financed Policies.

Accordingly, in conjunction with his negotiations with the Insurers, the Liquidator also engaged in extensive, parallel negotiations with Credit Suisse and Wells Fargo to resolve their involvement in the Liquidation Proceeding.

15. The result of the Liquidator's negotiations with the Insurers and Credit Suisse/Wells Fargo is a series of settlement agreements between: (i) the Liquidator and each of the Insurers; (ii) the Liquidator and Credit Suisse/Wells Fargo, relating to their overall claims against each other; and (iii) Credit Suisse/Wells Fargo and each of the respective Insurers, relating specifically to the Credit Suisse-financed policies issued by those Insurers—including the Financed Policies that are the subject of the Settlement Agreements.<sup>5</sup>

#### **Summary of Settlement Agreements<sup>6</sup>**

16. Under the various Settlement Agreements, certain of the subject Policies are to be surrendered, canceled or otherwise terminated, while other Policies will be released from and abandoned by the Liquidation Proceeding, and no longer subject to the Liquidation Order or the stay. In consideration for this, the Insurers and Credit Suisse will pay money to the Liquidator and the Liquidator and the other settling parties will exchange releases. The releases will be binding on any and all other parties asserting an interest in the Policies, including insureds and beneficiaries (the "Third Parties"). Approval of the Settlement Agreements will bar Third Parties from asserting claims against the Liquidator, the Insurers or Credit Suisse/Wells Fargo relating to the disposition of the Policies under the Settlement Agreements. All claims asserted against the

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<sup>5</sup> Execution of the Credit Suisse/Wells Fargo and Insurer settlement agreements are a condition precedent to the effectiveness of the Liquidator's settlement agreements. Those separate agreements have all been fully executed and attached to the pertinent Liquidator and Credit Suisse/Wells Fargo settlement agreements.

<sup>6</sup> Notwithstanding the recitation in this Memorandum a summary of the terms of the Settlement Agreements, this is a summary only and all parties in interest are urged to read the Settlement Motions and the Settlement Agreements. In the event of any conflicts or inconsistencies between the summary contained here and the terms of the Settlement Agreements, the terms of the Settlement Agreements shall control.

terminated Policies, including any claims relating to the validity and enforceability of any liens asserted against those policies, will ultimately be allowed, disallowed or otherwise resolved and administered under the applicable claims administration and adjudication procedures of the Liquidation Proceeding, including under any plan of liquidation that the Court may approve.

17. With the exception of the Liquidator-Lincoln National agreement concerning certain policies that were not financed by Credit Suisse, each Liquidator-Insurer Settlement Agreement has a parallel, related Liquidator-Credit Suisse Settlement Agreement that resolves Credit Suisse's interests in the Financed Policies issued by that Insurer. Under these agreements, eight of the thirteen Credit Suisse Financed Policies will be released from and abandoned by the Liquidation estate and will no longer be subject to the Liquidation Order and stay. The remaining 61 Policies, including five Credit Suisse Financed Policies, will be terminated and canceled.<sup>7</sup> Each such Liquidator-Insurer Settlement Agreement, does not become effective unless and until the entry of final orders by the Court in the Liquidation Proceeding approving that Settlement Agreement and the parallel, related Liquidator-Credit Suisse Agreement (the "Approval Orders"). The Approval Orders shall become final on the date that such orders shall have become non-appealable or, in the event of an appeal(s), have been affirmed after all appeals therefrom have been exhausted.

18. The Liquidator believes that the Settlement Agreements are fair, reasonable and adequate. The Settlement Agreements are the result of arms-length negotiations between the parties and their counsel. The Settlement Agreements will result in the payment of a material sum to the estate by AXA, Credit Suisse, Lincoln National and Phoenix. Although no payment

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<sup>7</sup> The eight Credit Suisse Financed Policies to be released from the Liquidation estate will remain in effect and Credit Suisse will pay the premiums that are in arrears with respect to those Policies to the respective issuing Insurer. The manner in which these payments are made and the identity of the payee are outlined in the settlement agreements between Credit Suisse and the Insurers.

is being made by American National for the release of its two policies that were financed by Credit Suisse, the treatment of those policies in the Settlement Agreements with American National is necessary to attain the global settlement with Credit Suisse. The global settlement with Credit Suisse is reasonable because, unlike all other entities that made premium financing available to Noble Trust or its clients, Credit Suisse disclosed the terms of its financing to the Insurers before the Financed Policies became effective. Moreover, the Liquidator's settlements with Credit Suisse allow the settlements with the Insurers to proceed without objection by and with the assent of Credit Suisse. The Settlement Agreements further maximize the value of the liquidation of Noble Trust by creating a fund that will be available to claimants of the estate, subject to further order of the Court, relieving the estate of further costs and from the potential risk of continued, substantial, complex and costly litigation with the Insurers, Credit Suisse and Wells Fargo. The Settlement Agreements also provide the basis for the comprehensive resolution that the Liquidator, Credit Suisse and Wells Fargo have negotiated concerning all policies financed by Credit Suisse.

19. The Settlement Agreements may affect the interests of Third Parties involved in the Policies including the insureds and their beneficiaries. The Settlement Agreements are nonetheless fair and reasonable with respect to those parties because in many cases the Policies were procured based on material misrepresentations such as the false claim that the purpose of the insurance was to facilitate estate planning when the insured actually intended to sell the Policy. Many insureds also misrepresented to the Insurers their net worth and the insurance applications failed to disclose that the premiums were being financed or the actual source or terms of such financing. Moreover, in most cases, the insureds and their beneficiaries in fact paid no money for the Policies. In equity, such persons should not be permitted to gain from that

kind of conduct and they have no legitimate grounds on which to object to the termination of the Policies. See Smith v. Mace, 44 N.H. 553, 559 (1863) ("[I]t is held, as a principle of policy, that the fraudulent party may lose, but can gain nothing by his fraud"); Mooney v. Nationwide Mut. Ins. Co., 149 N.H. 355, 359, (2003) (upholding rescission of insurance policy where insured made material misrepresentations to the insurer under the principle that insured cannot benefit as against the insurer from his fraudulent misrepresentations); Auto-Owners Ins. Co. v. Michigan Com'r of Ins., 141 Mich. App. 776, 780, 369 N.W.2d 896, 898 (1985) ("[A]n insurer may rescind an insurance policy and declare it void *ab initio* where such policy was procured through the insured's intentional misrepresentation of a material fact in the application for insurance.")

20. This Court has the power to grant the relief requested in the Motions, which includes authorizing the cancellation and the abandonment of the Policies and approving the releases, including the effects thereof on the Third Parties. The Court has the powers of a court of equity. RSA 498:1. As such, it has "broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation." Boynton v. Figueroa, 154 N.H. 592, 608 (2006). The power of courts in equity and, in particular, with insolvent estates, are "invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." Pepper v. Litton, 308 U.S. 295, 305 (1939). In bank liquidation cases such as this one, the Court's equity powers are no less expansive. See RSA 395:2 (court may issue orders as equity may require). It has the power to approve settlements allowing the liquidator to marshal assets for the benefit of creditors that are fair and reasonable. See In re Liquidation of The Home Ins. Co., 154 N.H. 472, 482, 488, 490 (2006). Among many other factors, the court can consider the public interest. See In re Public Serv. Co. of N.H., 108 B.R. 854, 873-74 (Bankr. D. N.H. 1989).

The Liquidator has the equitable power to administer the Policies and to obtain their value for the estate and the benefit of creditors. See 1 Ralph E. Clark, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS (3d ed. 1959) § 258.

21. The Liquidator therefore believes that entering into the Settlement Agreements is an appropriate and prudent exercise of the Liquidator's judgment, and that the settlements resolve the pending disputes between the Liquidator, the Insurers and Credit Suisse/Wells Fargo concerning the Policies on terms that are advantageous to the liquidation of Noble Trust and Noble Trust creditors. Accordingly, the Liquidator believes that approval of each Settlement Agreement is in the best interests of Noble Trust, its creditors, and all parties in interest. See In re Liquidation of The Home Ins. Co., 154 N.H. 472, 489-90 (2006).

### **Conclusion**

For the reasons stated herein, the Liquidator requests that the Court (i) enter orders, in substantially the same form submitted with each Settlement Motion, granting the Settlement Motions and approving the Settlement Agreements, and (ii) grant the Liquidator such other and further relief as is just.


Dated: June 6, 2013

Respectfully submitted,

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OF THE STATE OF NEW HAMPSHIRE,  
AS LIQUIDATOR OF NOBLE TRUST COMPANY

By his attorneys,

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